

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2017

Cir. Ct. No. 2016CV7

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DAVID ZIMMERMAN AND DAVID AND LE'ANN ZIMMERMAN REVOCABLE

TRUST,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF ELKHART LAKE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
DANIEL J. BOROWSKI, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. David Zimmerman and David and Le’Ann Zimmerman Revocable Trust (collectively the Zimmermans) appeal from an order on certiorari and summary judgment. They contend that the circuit court erred in affirming a decision to deny their petition to rezone their property. They further contend that the court erred in dismissing their takings claim. We disagree and affirm.

¶2 The Zimmermans are the owners of property in the Village of Elkhart Lake. In 2015, they sought to improve the property by building a new residence with an attached garage. The attached garage was to include a new apartment above it. The property already had an old apartment on it. Thus, the Zimmermans were seeking to have three residences on the property.

¶3 The Zimmermans’ property has been zoned as R-1 since 2010. Areas zoned as R-1 are considered single family residences, which means that they are permitted only one dwelling on them. The Zimmermans petitioned to rezone their property to permit construction of the additional dwellings. In support, they cited a 2006 agreement with neighbors, which contemplated the additional dwellings.¹

¶4 Following hearings on the matter, the Village of Elkhart Lake Board of Review (the Board) denied the Zimmermans’ petition to rezone their property. The Zimmermans sought certiorari review of that decision in the circuit court.

¹ In 2006, the Zimmermans struck a deal with neighbors under which the parties agreed to restrict by deed certain uses of their property. That deal, which the Village of Elkhart Lake was not a party to, allowed the construction of a new residence and new apartment on the Zimmermans’ property.

They also asserted a separate takings claim. The court affirmed the Board's decision and dismissed the takings claim. This appeal follows.

¶5 On appeal, the Zimmermans first contend that the circuit court erred in affirming the Board's decision to deny their petition to rezone their property. The Zimmermans focus on three standards of certiorari review: (1) whether the Board proceeded on a correct theory of law, (2) whether its action was arbitrary, and (3) whether the evidence supported its decision. See *Ottman v. Town of Primrose*, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411.

¶6 The Zimmermans assert that the Board failed to consider the criteria for rezoning found in its municipal code² and therefore proceeded on an incorrect

² The Village of Elkhart Lake Municipal Code dictates the potential consideration of the following criteria before changing a zoning classification:

- (i) Does the proposed zoning classification promote the health, safety, moral, or general welfare?
- (ii) The existing uses of the subject property and uses of adjacent and near properties.
- (iii) The current zoning of the subject property and adjacent or near properties.
- (iv) The extent to which property values are diminished by the present zoning restrictions.
- (v) The extent to which the restrictions diminishing property values, promote the health, safety, morals, or general welfare of the public.
- (vi) The relative gain to the public, compared to the extent of hardship imposed upon the individual property owner.
- (vii) The suitability of the subject property considered under the proposed zoning classification.

(continued)

theory of law. They also accuse the Board of acting arbitrarily by listening to the objections of neighbors, some of whom had previously agreed to the construction of additional dwellings in 2006. Finally, they complain that the decision to deny their petition lacked a sufficient basis. We are not persuaded by these arguments.

¶7 Here, the record supports the conclusion that the Board proceeded on a correct theory of law. Although the Board may not have formalistically recited each criterion for rezoning found in its municipal code, there is no requirement that it do so. In any event, we cannot say that it did not consider the criteria. The applicable code was cited at a hearing on the matter. Moreover, the Board touched upon the criteria either directly or indirectly in its discussions. Those discussions show that the Board evaluated the subject property, its zoning classification, the reason behind its zoning classification, its historical and proposed uses, and the impact rezoning would have on surrounding properties, the public, and the municipality's comprehensive plan.

¶8 The record also supports the conclusion that the Board acted properly and reached a reasonable decision. There was nothing arbitrary about listening to the viewpoints of neighbors when considering whether to rezone the subject property. The Board was not bound by the 2006 agreement and needed to know how permitting a functionally three-family use would affect surrounding

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- (viii) The history of the use of the subject property considered in the context of land development in the vicinity of the property.
 - (ix) Conformity with the most current Elkhart Lake Comprehensive Plan.

Village of Elkhart Lake Municipal Code § 16.28(3)(b) (2015).

properties and the public. Likewise, this was not a case where there was no basis to deny the Zimmermans' petition apart from the objections of some neighbors. The Board had just determined in 2010 that R-1 was the appropriate zoning classification for the property.³ The Board was understandably reluctant to reverse that determination, particularly when other properties in the area had been similarly zoned. The Board was also rightfully concerned that a private land agreement was being presented as a manner in which land owners could circumvent local zoning, thereby setting a troubling precedent.

¶9 For these reasons, we are not convinced that the Zimmermans have met their burden of overcoming the presumption of correctness afforded to the Board's decision. *See Ottman*, 332 Wis. 2d 3, ¶¶48, 50 (there is a presumption of correctness to a municipality's decision, and the petitioner bears the burden of overcoming it).

¶10 The Zimmermans next contend that the circuit court erred in dismissing their takings claim. Essentially, they argue that the court should not have decided the issue, as they had not planned on litigating the claim due to the limited factual record. Again, we are not persuaded by the Zimmermans' argument.

¶11 As noted above, the Zimmermans asserted a separate takings claim in addition to seeking certiorari review. They based their claim upon the same set of facts. Ultimately, the circuit court did not believe that a taking had occurred, as

³ The Zimmermans did not object to, or seek immediate review of, the 2010 zoning of their property.

the Zimmermans still had use of their property and a mere diminution in value does not constitute a taking. Accordingly, it dismissed the claim.

¶12 On this record, we cannot fault the circuit court for deciding the takings issue. The Zimmermans squarely put the claim before the court, and the court reasonably decided it. The fact that the Zimmermans do not like the court's decision is not grounds for a do-over.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2017-18).

